

## WORKS ON COMMONS

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### Introduction

1. There was common land in England and Wales before the Norman Conquest. It was central to the rural economy (and still may be). Many were the battles fought against landowners in the nineteenth century to prevent its enclosure and to ensure public access. People care passionately about it, both for its own sake and what it represents.
2. Accordingly the strict controls of building on and fencing of common land are to be expected and worthy of support. However from time to time they are undoubtedly inconvenient.

### What does the law say?

#### The restriction

3. Section 38 provides as follows:

***Prohibition on works without consent***

*38 (1) A person may not, except with the consent of the appropriate national authority, carry out any restricted works on land to which this section applies.*

*(2) In subsection (1) “restricted works” are–*

- (a) works which have the effect of preventing or impeding access to or over any land to which this section applies;*
- (b) works for the resurfacing of land.*

*(3) The reference to works in subsection (2)(a) includes in particular–*

- (a) the erection of fencing;*
- (b) the construction of buildings and other structures;*
- (c) the digging of ditches and trenches and the building of embankments.*

*(4) For the purposes of subsection (2)(b) works are for the resurfacing of land if they consist of the laying of concrete, tarmacadam, coated roadstone or similar material on the land (but not if they consist only of the repair of an existing surface of the land made of such material).*

4. So buildings, fences, banks, ditches and tarmacking are all expressly identified as restricted works. *Stationing* a caravan or a picnic table or whatever on the land would not in my view amount to *works* i.e in town planning terms what *works* covers is operational development and not a material change of use<sup>1</sup>.
5. The effect of (2) (b) and (4) is that *consent is not needed for the resurfacing of a common with loose material (eg gravel, shingle, crushed stone) so long as it does not impede or prevent access or does not interfere with rights over the common*<sup>2</sup>.
6. The land to which the section applies covers most land which one might think of as common land but it does not apply to a common which is subject to its special statutory regime eg Wimbledon and Putney Common.

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<sup>1</sup> Common Land Guidance Sheet 1b contains a list of works and processes that do not require consent because they (a) are so small or of such short duration that they do not impede access; (b) they do not constitute a new impediment to access; (c) facilitate access; or (d) are processes (rather than works) that do not need consent because they do not impede access. The examples of (d) that are given are *burning* and *management of vegetation by mechanical means*.

<sup>2</sup> Common Land Guidance Sheet 4.

## The consent

### Consent: general

7. Section 39 provides:

*39 (1) In determining an application for consent under subsection (1) of section 38 in relation to works on land to which that section applies, the appropriate national authority shall have regard to—*

- (a) the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);*
- (b) the interests of the neighbourhood;*
- (c) the public interest;*
- (d) any other matter considered to be relevant.*

*(2) The reference in subsection (1)(c) to the public interest **includes** the public interest in—*

- (a) nature conservation;*
- (b) the conservation of the landscape;*
- (c) the protection of public rights of access to any area of land; and*
- (d) the protection of archaeological remains and features of historic interest.*

8. Consent may be given for all or part of the proposed works; and subject to modifications and conditions (sub-section (3)). Consent may be retrospective (sub-section (7)).

9. An interesting approach has been adopted by Parliament in identifying relevant matters. The section might have been unspecific leaving the matter at large or perhaps subject to policy guidance; but instead a (non-exhaustive) checklist has been produced. Not surprisingly, when they make decisions, inspectors go through the checklist, item by item.

10. The power to impose conditions is particularly important because many of the permitted works will be temporary and it is important that the land should be restored to its pre-existing state. Conditions are made enforceable by section 41: *any person* may make an application in the County Court.

11. The Secretary of State has a *Common Land Consents Policy*, the latest iteration of which is dated November 2015. Much of it is what one might expect but it does contain some important specific guidance, some of which (as we shall see) has proved difficult in application<sup>3</sup>.

12. Government seeks to:

- safeguard commons for current and future generations to enjoy;
- ensure that the special qualities of common land, including its open and unenclosed nature, are properly protected; and
- improve the contribution of common land to enhancing biodiversity and conserving wildlife.

13. It seeks to achieve the following outcomes:

- any use of common land is consistent with its status

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<sup>3</sup> Welsh Policy is similar but different.

- works take place on common land only where they maintain or improve the condition of the common or where they confer some wider public benefit and are either temporary in duration or have no significant or lasting impact.

14. Thus, very importantly and as a matter of policy, wider public benefit is not enough unless the works are simply temporary or they do not have a significant impact<sup>4</sup>.

## Procedure

15. The procedure is governed by section 40 and the Works on Common Land etc (Procedure) (England) Regulations 2007 (SI 2007 No 2588). No fee is payable.

16. The guidance notes for filling in the form are both helpful and sensible. In answering the question *Why the works are needed* it says:

*It is important to give a full response here in support of your proposal. You should address such questions as:*

- *How will the works help to protect, maintain or improve the common, having regard to all the interests in it?*
- *What options have you considered for achieving your aims, and why did you decide on this one?*
- *Where any options involving less (or no) works on common land considered? Why were these rejected?*

17. The Open Spaces Society must be given notice. In any controversial case, if you are an applicant it will be worth speaking to the OSS before making the application. Ideally an applicant will have consulted the OSS and will be able to tell the Secretary of State that this is the case.

In principle it might be necessary to carry out an Environmental Impact Assessment to accompany the application; I am not aware of this requirement having arisen in practice.

## Examples and cases

18. Many applications are for comparatively minor works which are not permanent and secure a public benefit. These are not controversial. Thus one may cite the laying of an underground gas or water pipe or an electricity cable<sup>5</sup>. The *Common Land Consents Policy* says

***Improvements to public services:*** *Similarly, works may be proposed in relation to common land which do not benefit the common, but confer some wider benefit on the local community, such as minor works undertaken by a statutory undertaker (e.g. a water utility) to provide or improve the public service to local residents and businesses. In such cases, our expectation is that applications for such purposes on common land are more likely to be successful under section 16(1), so that an exchange of land is proposed and can be considered on its merits. However, consent under section 38 may be appropriate where the works are of temporary duration (such as a worksite), where the works will be installed underground (such as a pipeline or pumping station), or where their physical presence would be so slight as to cause negligible impact on the land in question (such as a control booth or manhole), and the proposals ensure the full restoration of the land affected and confer a public benefit. (See also*

<sup>4</sup> Policy in Wales is the same.

<sup>5</sup> A good recent example is *Hempton Common, Norfolk* (decision date 16 October 2018): COM/3208194. This concerned a works compound of 160 sq m required for a period of not more than 6 weeks.

*the Secretary of State's policy in relation to vehicular ways across common land in paragraph 5.9 above.)<sup>6</sup>*

19. As regards buildings, the *Common Land Consents Policy* says:

*Consent will not normally be granted under section 38 for permanent buildings on common land, because such development is normally incompatible with the future use of the land as common land. However, where such buildings are intrinsically related to the enjoyment or management of the common, such as a cricket pavilion, lambing shed or a keeper's hut, consent under section 38 may be considered appropriate.<sup>7</sup>*

20. Fencing may be permissible<sup>8</sup>. A good example is *Verne Common, Portland*<sup>9</sup>. Here the works were proposed to facilitate scrub clearance and to improve the biodiversity of the land by way of grazing, initially by goats and then by ponies. (Stock fencing was required to enclose the grazing animals). The focus of the inquiry was on maintaining public access to the common.

21. Every so often however an applicant will come unstuck. There can of course be no guarantee that any proposal will be approved balancing harm against benefit. The existence of such cases is salutary reminder to applicants to take the whole process very seriously indeed.

22. I take as an example an interesting case from Sevenoaks.

23. The Vine is known to cricket lovers as one of the oldest cricket grounds in England, dating from 1734. Apparently however the site was never developed for first class cricket because, being common land it could not be inclosed<sup>10</sup>. The land which this case concerned was nearby land registered as common land.

24. The land had been gifted to the town of Sevenoaks<sup>11</sup> in 1921 by Lord Sackville

*... to be forever hereafter used and maintained as a site for a public memorial to those men of Sevenoaks who fell in defence of the country in the Great War and for an open space and place of public recreation for the benefit of persons within the neighbourhood of the urban district of Sevenoaks<sup>12</sup>.*

25. The land was used for walking, walking dogs and informal recreation.

26. The proposal by Sevenoaks District Council<sup>13</sup> was to use the land as a temporary car park for 70 cars until June 2019<sup>14</sup> while development took place on the site of a pre-existing car park<sup>15</sup>.

27. There were evidently many objections, including one from the Vine Preservation Association<sup>16</sup>.

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<sup>6</sup> See paragraph 5.16.

<sup>7</sup> See paragraph 5.13.

<sup>8</sup> Accesses provided will need to comply with the BS: see paragraph 5.12.

<sup>9</sup> (Decision date 24 January 2018): COM/316849.

<sup>10</sup> It is now home to Sevenoaks Cricket Club and, I believe, registered as a town or village green.

<sup>11</sup> It is now owned by the Town Council.

<sup>12</sup> Rather unfortunately the Inspector leaves out of his quotation of this passage the fact that the land was given as a memorial to those who died in the First World War, and seemingly this fact played no part in his decision. However it cannot have helped the application.

<sup>13</sup> Note that they must have had the Town Council on board. It does not appear what was the consideration (if any) the Town Council were to receive.

<sup>14</sup> The application had been made in December 2017.

<sup>15</sup> The users of the existing car park all had permits, so were evidently long term rather than casual users.

<sup>16</sup> I guess that this was a body that existed before the application but I do not know.

28. The objectors took a number of points that the Inspector did not accept, namely

- damage to trees;
- loss to the historic setting of the Vine;
- highway safety
- that the land might not be restored to its former use<sup>17</sup>;
- loss of residential amenity by increased traffic;
- access for emergency vehicles;
- drainage.

29. However it was self-evident that the proposal would lead to a (temporary) loss of land used for recreation and (the Inspector held) have a significant adverse impact of the landscape (albeit temporary).

30. In terms of need, the applicant was in difficulty because the car park being replaced had already closed.

31. In his conclusion the Inspector said:

*Bearing in mind all of the above, there will be some adverse effect on the interests of the neighbourhood and public. However any works and the consequential use of the land for car parking will be of a temporary nature as will any adverse impacts ...*

32. And one thinks he is going to go on to grant consent. But he does not. The reason is that he does not consider the replacement car parking to be a public benefit; and, he emphasises, it is inconsistent with the status of the common. Once he discounted any public benefit arising from the use, it might seem as though there could only be one answer. What of course he does not say is that there was (in his terms) a private benefit; and that the public interest may be served by accommodating that private interest<sup>18</sup>.

### **Access over commons**

33. The Secretary of State accepts that the provision of a vehicular access way across a common may not be for the benefit of the common itself but nonetheless be justified on the basis of TINA<sup>19</sup>. Thus paragraph 5.9 of the *Common Land Consents Policy* is as follows:

*Where it is proposed to construct or improve a vehicular way across a common, consent will be required under section 38 if the works involve the 'laying of concrete, tarmacadam, coated roadstone or similar material' (other than for the purposes of repair of the same material). Such an application may be consistent with the continuing use of the land as common land, even where the vehicular way is entirely for private benefit, because the construction will not*

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<sup>17</sup> Restoration could be required by condition.

<sup>18</sup> An interesting contrast with this case is *Little Arrow Moor, Walna Scar, Coniston* (Decision date 20 August 2018): COM/3187941. This was a case where an application was granted for a public car park for 56 vehicles in a sensitive site in the Lake District National Park (and there were many objections). It may be noted however the site was already being used for car parking and the object of the application was to improve arrangements.

<sup>19</sup> That there is no alternative.

*in itself prevent public access, or access for commoners' animals. However, by its very nature, paving will have an impact on the enjoyment of the common, by reducing the area available for recreation and grazing, by causing harm to habitat, perhaps by affecting drainage, and by introducing an urbanising feature into what will normally be an essentially open and natural setting. The Secretary of State takes the view that, in some circumstances, a paved vehicular way may be the only practical means of achieving access to land adjacent to the common. Where an existing unsurfaced means of access is already in use, a sympathetic paving proposal may be aesthetically preferable (emphasis supplied).<sup>20</sup>*

34. Paragraphs 5.14 and 5.15 of the *Common Land Consents Policy* are as follows:

*5.14 Some proposed works on common land do not benefit the common but nevertheless there is a potential underlying public benefit, for example works for the generation of sustainable energy, or at a more local scale, the laying out of a cycle path to improve sustainable travel opportunities, or the installation of statutory undertakers' apparatus.*

*5.15 Infrastructure projects: The Secretary of State wishes to promote sustainable energy generation in an appropriate setting, but equally, her policy is to ensure that the stock of commons is not diminished, that works on common land must maintain or improve the condition of the common, and the use must be consistent with its status as common land (see Part 0<sup>21</sup> above). To balance these issues her expectation is that applications for such infrastructure projects on common land are more likely to be successful under section 16(1), so that an exchange of land is proposed and can be considered on its merits. An application for consent to such works under section 38(1) will rarely be granted unless there are convincing reasons why an application under section 16(1) cannot or ought not to be pursued. (See also the Secretary of State's policy in relation to vehicular ways across common land in paragraph 5.9 above.)<sup>22</sup>*

35. The first thing to say is that the Secretary of State was evidently not envisaging that these words applied to access to housing development. Nonetheless they are evidently not limited to the examples given; and, of particular importance of the examples given is that of the laying out of a cycle path (if cycle paths why not access ways?).
36. A problem that developers frequently encounter is that of a "highway verge" common which lies between the development site and the highway.
37. The developer potentially faces two issues in this situation: he may not own the common and he needs permission for his works.
38. The first issue is essentially one of acquiring the necessary rights, potentially made worse by not knowing who the owner is.
39. The second issue is potentially addressed by an application under section 38. But here, of course, the developer runs up against the argument that what he should be doing is providing exchange land (and making an application under section 16).
40. This was the scenario in application relating to a common in Wimborne, Dorset<sup>23</sup>. Improved access was needed over a highway verge common to provide access for a development of 305

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<sup>20</sup> Paragraph 4.9 in Wales.

<sup>21</sup> Sic.

<sup>22</sup> There may however be reasons why deregistration is undesirable, because the land will cease to be protected and the remaining land fragmented: see paragraph 5.10. The relevant paragraphs in Wales are 4.13, 4.14 and 4.9.

<sup>23</sup> *Leigh Common, Wimborne* (Decision date 20 September 2017): COM/3169414.

houses<sup>24</sup>. Some 870 sq metres was required. The land was owned by Sir William Hanham who was supportive.

41. There were objections which said, among other things, that the matter should have been progressed by section 16 and the provision of exchange land: citing, of course, the *Common Land Consents Policy*. The Inspector said:

*Some published guidance relating to works which do not benefit the common but which have potential wider benefit suggests that applications might be more likely to be successful under section 16, for example infrastructure works in connection with sustainable energy generation. Such an application might I think have been possible in this case. However no such application has been made and the current application must be considered on its merits in accordance with the relevant criteria set out in section 39 of the Act.*

42. In effect, he was discounting the Secretary of State's policy (if it applied) – because the only way that that policy could be enforceable would be if a section 38 application were refused on the basis that a section 16 application ought to have been brought instead.

43. The Inspector went on to grant consent.

44. This is not the end of the story, however. An adjoining site (for 81 houses) also needed access over the highway verge: some 2224 sq m was required. A further application was made<sup>25</sup>. The objection based on the appropriateness of proceeding under section 16 rather than section 38 was repeated<sup>26</sup>.

45. The developer took three points:

- (i) delay<sup>27</sup>
- (ii) the land in question was a “non-functional fragment” and a small piece replacement land would be no significant benefit; the planning permission would deliver additional open space;
- (iii) the precedent established by COM 3169414.

46. The Inspector said:

*35 ... there are (arguably) clear policy reasons to reject an application for this proposal under the section 38 procedure.*

*36 However, it has to be acknowledged that the Secretary of State has recently granted section 38 consent to an almost identical proposal for an adjoining development site. Further, [although] a lack of resources within the commons registration authority should not provide justification for a loss of valuable common land ... the explanation offered by the applicants' agent suggests this application is a pragmatic solution to a very real problem facing the*

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<sup>24</sup> Leigh Common extends in total over 9.1 ha (22.512 acres) but most of this is on the other side of the road.

<sup>25</sup> See *Leigh Common, Wimborne Minster* (Decision date 27 June 2018): COM/3190392.

<sup>26</sup> By Natural England and the Open Spaces Society. Who made it in the original application does not emerge.

<sup>27</sup> ... the applicants' agent explained that an application would have to be made by the County Council as the land in question forms part of the highway. He reports that “the County Council was not minded to participate in this exercise and has not even had a Senior Definitive Map Officer (including responsibilities for common land) in its office for months ... A complete impasse would have been reached if the section 16 (1) route had been sought to be followed”. He points out that the site needs to come forward as part of the adopted development plan and that the local planning authority wishes to see this strategic housing and school site progressed, being reliant upon it for its 5-year housing land supply. This is a bit odd because the definition of common in the Commons Registration Act 1965 (by reference to which the land was registered as a common) excludes land forming part of a highway.

*development of land within a challenging time frame. Not least, the legislation itself does not preclude the granting of consent for the works proposed here under the provisions of section 38.*

*37 ... every application is considered on its individual merits and a determination may depart from policy if it is appropriate to do so. Although in other circumstances the policy arguments for rejecting this application may hold firm, in this case I consider the factors listed above must lean in favour of a departure from the published policy.*

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*64 I accept that the DEFRA Common Land Consents Policy implies that section 38 of the 2006 Act is not the appropriate mechanism to grant consent for works of this nature but for the reasons I have explained in paragraphs 36 and 37 above, **in this particular case I have concluded that an exception should be made** and that the application should be granted (emphasis supplied).*

47. Thus although the Inspector did not expressly determine whether the policy requiring a section 16 application applied, she determined the case on the basis that it did.

48. Obviously there is a difference of approach between the two *Leigh Common* decisions.

49. Recently there has been a third relating to 86 sq m of highway verge<sup>28</sup>: the relevant paragraphs read as follows:

*12. OSS contends that an application under section 16 and not section 38 of the 2006 Act to deregister and exchange common land should have been made as this would allow for the provision of replacement land to offset the loss of green space to hard surfaced road. However, granting consent for the works will not lead to a reduction in the stock of common land – the application land will remain registered common. Whilst it may be that a section 16 application could have been made, the applicant applied under section 38 and has given reasons for not instead making a section 16 application.*

Pausing at this point, those reasons (which the Inspector evidently accepted as factually correct) are not set out in the short decision letter.

*Furthermore, common land legislation does not preclude the granting of consent for the proposed works under the provisions of section 38. There is no sound reason for declining to determine the application which has been decided on its merits.*

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*14. OSS raises the issue of consistency in decision making and points to the decision on application reference COM/3190392 made under section 38 for restricted works relating to a road scheme in Dorset (the Dorset case). OSS is concerned that granting the application before me would be inconsistent with the decision issued in the Dorset case. I give this argument little weight as whilst the Dorset case Inspector considered the issue of whether section 38 or section 16 was the most appropriate application mechanism, she went on to determine the application and grant consent. Furthermore, application decisions do not set precedents<sup>29</sup>.*

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<sup>28</sup> *Dunfold Green and Common, Surrey* (decision 26 October): COM/3203592. The development was of 8 units of affordable housing by a housing association.

<sup>29</sup> Note that in this case there was de facto replacement land (albeit it was common land) in that the existing field access across the verge was stopped up and laid to grass.

49. On the face of it, the outcome to a section 38 application may depend on which Inspector determines the application. Of course difference of approach does not mean difference of outcome: I am not aware of an application where the Inspector has refused an application by reference to the Secretary of State's policy<sup>30</sup> either in relation to accesses or generally.

### **Exchange land**

50. It is appropriate to conclude by saying something about section 16 and exchange land.

Paragraph 5.1 of the Common Land Consents Policy provides as follows:

*The Secretary of State's primary objective in determining applications under section 16(1) is to ensure the adequacy of the exchange of land in terms of the statutory criteria. Therefore, even where an applicant makes an otherwise compelling case for an exchange, the Secretary of State's expectation will be that the interests (notably the landowner, commoners, and the wider public) will be no worse off in consequence of the exchange than without it, having regard to the objectives set out in Part 0 above. Her expectation is more likely to be realised where the replacement land is at least equal in area to the release land, and equally advantageous to the interests. So the Secretary of State will wish to evaluate the exchange in terms of both quality and quantity. An inadequate exchange will seldom be satisfactory, whatever the merits of the case for deregistration might otherwise be.*

51. It will be helpful to look at *Chipperfield Common, Hertfordshire*<sup>31</sup>.
52. St Paul's, Chipperfield is a church that was built in the 1830, and is surrounded by a traditional churchyard which provides burial space for parishioners. They are running out of burial space and it would be easy to extend the churchyard to provide additional space<sup>32</sup>. However the land is common land. The simple way to extend the church yard was by way of an application under section 16 and the provision of replacement land.
53. Those promoting the proposal carried out a survey and received overwhelming support; the Inspector recorded that *it appears that there is a strong desire within the local community to ensure that family members can continue to be buried in the village and not in burial grounds in other towns some distance away*. The OSS was consulted and did not object. The replacement land was twice as large as the release land. Granting the application, the Inspector recorded that *this proposal will have very little adverse effect on either the interests of the neighbourhood or the wider public and will be of benefit to both*. What may be noted is that the replacement land was 1 km distant from the release land.
54. A recent example of section 16 being used successfully to facilitate access over a highway verge that was common was Land to the east of Loxwood Road, Alford Crossways, Surrey<sup>33</sup>.
55. However, as with section 38 applications, success is not always achieved. An example is *Therfield Heath, Hertfordshire*<sup>34</sup> where selling access land to improve the access would have

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<sup>30</sup> In *Butts Close, Hitchin* (Decision date: 25 January 2018) a proposal for a new access way would have had a significant detrimental effect on the common; the proposal included also a car park which would have had a detrimental effect on the common. However the argument that the matter should have been pursued by way of a section 16 application does not figure in the Inspector's decision to refuse the application.

<sup>31</sup> (Decision date: 15 August 2018): COM/3198278.

<sup>32</sup> I think that the extension may remain separate from the existing churchyard and not vested in the church.

<sup>33</sup> (Decision date 8 March 2017): COM/3156299.

<sup>34</sup> (Decision date 18 May 2018): COM/3170236.

generated about £1.4M to improve the common. Hugely controversial, the application was considered at an inquiry lasting at least 6 days<sup>35</sup>. The replacement land appears to have been in practice available in any event and significant harm would have arisen by the loss (!) of a car park on the release land.

12 November 2018

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<sup>35</sup> The decision letter does not record the days on which the inquiry actually sat.